

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK GRAHAM,

Defendant and Appellant.

A114727

(Alameda County
Super. Ct. No. 152232)

A jury convicted defendant Derrick Graham of residential burglary (Pen. Code, § 459). The trial court sentenced defendant to four years in prison. Defendant contends he was denied the effective assistance of counsel at his trial. We need not reach the issue of whether counsel's performance was deficient because defendant has failed to show prejudice. Accordingly, we affirm.

I. FACTS

Under applicable standards of appellate review, we must view the facts in the light most favorable to the judgment of conviction, and presume in support of the judgment the existence of every fact which the jury could reasonably find from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

Juan Clark lived at 3933 Delmont in the Oakland Hills. At approximately noon on March 14, 2006, he heard a tapping noise coming from outside his house. He opened his front door and saw someone breaking into the house next door, 3939 Delmont, by breaking through a window. He described the man as black, with a dark brown

complexion, and wearing a grayish-black “hoodie,” or hooded sweatshirt. The man wore the hood up, but turned his face towards Clark for a “quick second.” Clark went back into his house and called 911. Clark did not want the man to see him because he didn’t want the man “to come bother me”

Officers Chew and Endow responded to the 911 call. According to Clark, the officers arrived about five minutes after he made the call. Chew spoke with Clark, who was standing in front of his house. Clark told him that someone had broken into the house next door through a window, and was still inside the house. Chew and Endow stayed in front of the house, and radioed for other officers to cover the rear from the next street over to the west, Gardenia Place.

After about three minutes, Chew saw a man climb up to the broken window from the inside in a crouching position, and duck his head out. The man was wearing a black hoodie and blue jeans. Chew was able to get a look at the man’s face, for a second or two. The man “took a quick peek left and right and hopped out the window and fled westward through the yards” toward Gardenia Place. Officer Chew positively identified defendant in court as the man he saw hop out the window and run west. Chew was certain of his identification. Chew noted that defendant had a distinctive nose.

Officer Pappas responded to the 911 call and heard a description of the suspect on the radio. Pappas was also told that the suspect was fleeing west from 3939 Delmont toward Gardenia Place. Pappas went to 3859 Delmont, which apparently was on a western route from 3939 Delmont. Pappas saw a man matching the suspect’s description running in the back of 3859 Delmont.

The man saw Pappas and changed direction. Pappas and other officers started a search and found the man hiding behind some wood piled against a garage in the rear of 3859 Delmont. The man tried to flee. Pappas wrestled him to the ground and handcuffed him. Pappas positively identified defendant in court as the man he arrested that day behind 3859 Delmont.

On cross-examination, Pappas testified he was unfamiliar with the name Juan Clark and did not recall or have anything to do with an in-field identification involving Clark.

Chew heard on his radio that defendant had been arrested in the 3800 block of Delmont, and went there to identify him. Chew told Pappas defendant was the man Chew had seen running from the burglarized house. After Chew identified defendant, officers took defendant back to Clark's house.

Officer Wong used a cell phone to call Clark and tell him he was bringing a suspect to the front of Clark's house for a possible identification. Clark spoke to Wong from inside his house. Wong wanted to keep Clark's identity secret for fear of retaliation. Wong told the officer who was transporting defendant, to take defendant out of his car at the front of Clark's house and pretend to search him, so Clark could identify defendant without leaving his house.

Clark testified that he told Officer Wong, " 'that looks like him.' I mean, same clothing description, same clothing. . . . So I told him that, you know, it appears [to be] the same clothing. Appears to be him, but I—you know, I think—I don't remember if I said—I told him I couldn't be a hundred percent sure that was him because I didn't see him real, real good."

When Clark was asked to identify defendant in court as the man the police asked him to identify, he testified that defendant "looks similar" to the man, but "I can't a hundred percent ID him." Clark had lived in his house for five years and had never seen defendant in the neighborhood before.

Officer Wong testified differently about Clark's in-field identification. According to Wong, Clark's in-field identification was unequivocal: Clark told Wong "that was the guy that he saw." Clark did not say that defendant "looked like the guy," or say anything about his clothing—Clark just said, "that was the guy." On cross-examination, Wong denied that Clark had told him he could not be positive about defendant's identification.

Chew testified that defendant was not wearing gloves. An evidence technician did not find any fingerprints on the broken window. A strange glove was found in the house.

The two residents of 3939 Delmont testified that several items, including a camcorder, DVD player, and liquor bottles, had been moved around inside the house. The victims were missing a wallet, earrings, an antique locket, silver and gold chains, a gold and silver bracelet, a \$50 bill, and about \$60 to \$120 in American and foreign currency. In addition, they may have been missing a \$5 bill and some \$1 bills.

A search of defendant after his arrest did not yield the foreign currency or the jewelry items missing from 3939 Delmont. Defendant did have a set of keys that fit a car which was parked, unlocked, down the street and on the wrong side of the street.

It was stipulated that when defendant was booked he possessed \$59.02: a \$50 bill, a \$5 bill, four \$1 bills, and two pennies. Approximately two weeks after defendant's arrest, the missing wallet was found in a backyard of a house on Gardenia Place.

Defendant did not testify. He presented the testimony of Darryl Coleman, the mail carrier for the victims' neighborhood. On the morning of the burglary, Coleman saw two young men wearing black hooded sweatshirts and blue jeans sitting in front of a vacant house. Shortly thereafter, Coleman saw the men standing in front of another house. Coleman described their attire as "typical—what most youngsters wear these days." Coleman had never seen the two men before. Coleman later saw a man running from police. He described the man as a "blur" that "shot past me." He didn't think this person had a hood on. Coleman could not identify a photograph of defendant as someone he saw that day.

Defendant's counsel argued to the jury that defendant was innocent and this was a case of mistaken identity. Counsel stressed that defendant was not found with the missing wallet or jewelry, and that there were two young men in the neighborhood who might have committed the burglary. The jury rejected these arguments and convicted defendant of residential burglary.

II. DISCUSSION

Defendant contends he was denied the effective assistance of counsel at his trial. We conclude that defendant has not shown ineffective counsel because any deficient performance of counsel was not prejudicial to defendant.

To establish a claim of ineffective counsel, a defendant must show (1) that counsel's performance was deficient; and (2) that the deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*).)

To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonable competence. (*Strickland, supra*, 466 U.S. at pp. 687-688; *Anderson, supra*, 25 Cal.4th at p. 569.) When a claim of deficient performance is made on direct appeal, and where—as in the present case—the record does not show the reason for counsel's challenged failures of performance, we must affirm unless “there could be no satisfactory explanation.” (*Anderson, supra*, 25 Cal.4th at p. 569; *People v. Pope* (1979) 23 Cal.3d 412, 426 (*Pope*).)

In cases where there might be such a satisfactory explanation (such as trial tactics) which is not revealed by the record, a defendant must raise the claim of ineffective counsel by a habeas corpus proceeding and seek an evidentiary hearing to explore additional facts. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *Pope, supra*, 23 Cal.3d at p. 426.)

Assuming a defendant has made a showing on direct appeal of deficient performance of counsel, we must nevertheless affirm the conviction unless the deficient performance has been prejudicial—i.e., that but for counsel's deficient performance it is reasonably probable that the result of the trial would have been different. (*Strickland, supra*, 466 U.S. at p. 694; *Anderson, supra*, 25 Cal.4th at p. 569.) “A reasonable probability is a probability [that is] sufficient to undermine confidence in the outcome.” (*Strickland, supra*, at p. 694.)

The defendant must show prejudice by affirmative proof. (*Strickland, supra*, 466 U.S. at p. 693.) If defendant fails to meet his burden of showing prejudice, a reviewing court should reject his claim of ineffective counsel without even reaching the question whether counsel's performance was deficient. (*Id.* at p. 697; *In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

Defendant contends he was denied the effective assistance of counsel due to three instances of allegedly deficient performance of counsel, all based on omissions such as a failure to object or to request an instruction.

First, defendant contends his trial counsel should have objected to Officer Wong's testimony about Clark's unequivocal in-field identification, i.e., that Clark told Wong "that was the guy that he saw." Defendant argues that this prior statement of Clark was inconsistent with Clark's more equivocal trial testimony, i.e., that he told Wong "that looks like him." Defendant further argues that Wong's testimony about Clark's prior inconsistent statement was inadmissible hearsay because Clark had not been given the opportunity to explain or deny the prior inconsistent statement. (Evid. Code, §§ 770, 1235.)

Second, defendant contends his trial counsel should have requested a limiting instruction when the jury learned of defendant's prior conviction. During the direct examination of Officer Pappas, the prosecutor asked the officer if he had found any outstanding warrants when he arrested defendant. Pappas replied, "I don't recall any warrants, but I recall that he was on probation for narcotics." Defendant claims trial counsel should have requested a limiting instruction so that the jury would not have drawn an improper prejudicial inference from the fact of the prior conviction.

Third, defendant contends his trial counsel should have objected to the prosecutor's comment during closing argument that the standard of proof was "the highest standard" of "beyond all possible doubt"—not beyond a reasonable doubt—and thus confused the jury regarding the People's burden of proof.

We need not discuss whether trial counsel's three omissions fell below the reasonable standard of objective competence based on the merits of the legal issues involved, for two reasons.

First, defendant cannot establish deficient performance of counsel on direct appeal because the record does not show there could be no satisfactory explanation for counsel's three omissions.

Clark’s prior inconsistent statement. The inconsistency between “that looks like him” and “that is the guy” is not that striking in the context of identification in general and Clark’s testimony in particular. Clark positively identified the clothing worn by the burglar that day and testified in court that defendant looked “similar” to the man he saw break into the house. It may well be that trial counsel did not want to raise an objection to Wong’s testimony regarding the prior inconsistent statement, because that would draw further attention to Clark’s identification in the minds of the jurors—while counsel wanted to emphasize that any and all identifications of defendant, including Clark’s and Officer Chew’s, were simply mistaken.

Also, it appears that trial counsel may have decided, as a matter of tactics, to leave the inconsistency unexplained as an example of why the jury should look askance at eyewitness identification. During closing argument, counsel highlighted the inconsistency and used it for tactical advantage: “So you see, eyewitnesses always sometimes see things differently. You have Officer Pappas saying this in-field identification never happened. You have Officer Wong saying yes, it happened. Juan Clark told me he was the guy, and then you have Juan Clark coming in and saying yes, it happened, I told them I couldn’t be sure that that was the guy. Three different versions of the same event.”

Reference to the prior conviction. A trial counsel may decline to request a limiting instruction regarding a prior conviction to avoid calling the jury’s further attention to the prior. (*People v. Hinton* (2006) 37 Cal.4th 839, 877-878.) In this case, trial counsel seemed to make a tactical decision to leave the single, passing reference to the conviction before the jury, and use it to his tactical advantage. In his closing argument, counsel used the prior as justification for an allegedly innocent man to flee from pursuing police: “It’s a scary situation when somebody’s chasing you [and] has a gun. And we know in commonsense [*sic*] that there’s a flight or fight instinct when you’re scared. And somebody here, my client, chose to flight [*sic*].

“And also here you heard Officer Pappas testify that [defendant] was on probation. Is it reasonable that somebody who’s on probation, as Officer Pappas didn’t really know

what he was on probation for, but he testified [defendant] was on probation for narcotics. Would that explain reasonably, is it reasonable—maybe you wouldn't do it, but would it be reasonable for a young man on probation to run when police are chasing people in that area? Yes, that's a reasonable explanation. And I think then that eliminates the circumstantial evidence that's suggested by flight.”¹

Closing Argument Regarding Burden of Proof. We have reviewed the complete argument made by the prosecutor, and conclude that the reference to “the highest standard” of “beyond all possible doubt” has been taken out of context. The prosecutor repeatedly referred to “reasonable doubt” as the standard of proof, and the jury was duly instructed thereon. At worst, the prosecutor may have suggested that the People were held to a *higher* standard of proof than reasonable doubt—and we have difficulty seeing why that would warrant an objection from the defense.

Second, defendant has failed to make an affirmative showing of prejudice.

Officer Chew positively identified defendant as the man who emerged from the burglarized premises and fled. Chew was certain of his identification and noted defendant had a distinctive facial feature. Officer Pappas positively identified defendant as the man he saw fleeing from the premises. Pappas also positively identified defendant as the man he found hiding behind a woodpile near a garage. One victim's wallet was discovered near the path of defendant's flight. Defendant's car was parked near the premises, unlocked and on the wrong side of the street, presumably poised for a getaway. Defendant was found in possession of a bill of a major denomination (\$50), the same denomination of a bill missing from the house. Juan Clark testified that he told the police that defendant looked similar to the burglar, and was wearing the same clothing. There was no reasonable explanation for defendant's presence in the neighborhood, including his flight from police and his hiding from pursuing officers.

¹ Defendant claims that counsel had no tactical reason to not request clarification that the prior involved marijuana. Defendant suggests that the term “narcotics” is inherently more sinister to the mind of a juror than “marijuana.” We disagree.

While this evidence may fall short of overwhelming, it falls well above the level of substantial. Given this clear evidence of identity and guilt, any alleged deficiency of counsel's performance would not give rise to a reasonable probability of an acquittal.

III. DISPOSITION

The judgment of conviction is affirmed.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.